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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JASON MOREY MARTINEZ, Defendant and Appellant.	H037526 (Santa Clara County Super. Ct. No. B1050319)

Defendant Jason Morey Martinez was convicted by plea of petty theft with a prior involving a single victim in violation of Penal Code section 666.[1] He also admitted to having two violent or serious prior felony convictions within the meaning of sections 667.5, subdivisions (b) through (i) and 1170.12, and a prison prior within the meaning of section 667.5, subdivision (b). The court granted, in part, his *Romero*[2] motion, dismissing the oldest prior strike and staying the prison prior in the interests of justice under section 1385. The court then sentenced Martinez to six years in prison for the petty theft, consisting of the upper term of three years, doubled for the remaining prior strike. The court imposed various fines and fees and ordered $402.50 in victim restitution, the total claimed loss of two victims, a mother and adult daughter, but payable to only one of them. The court awarded Martinez actual custody credits of 326 days, plus conduct

[1] Further unspecified statutory references are to the Penal Code.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

credits under section 4019, subdivision (f) of 162 days, for a total of 488 days of pre-sentence credit.[3]

On appeal, Martinez contends on equal protection grounds that he is entitled to additional conduct credit based on legislative changes to section 4019, expressly operative to crimes committed on or after October 1, 2011. He further challenges $238 of the $402.50 victim-restitution order, contending that this portion represents a loss that is not related to the crime of which he was actually convicted or to the loss actually suffered by the victim to whom the total restitution amount was ordered to be paid. We reject defendant's claim of entitlement to additional conduct credits but conclude that the restitution order must be reduced by $238 to $164.50. As so modified, the judgment is affirmed.

STATEMENT OF THE CASE

I. *Factual Background*[4]

In April 2010, Martinez moved in to a two-bedroom apartment in Mountain View. He moved into the apartment where his childhood friend, Leslie Isgrig, and Isgrig's 18-year old daughter, Brittany, already lived. Martinez slept in one of the bedrooms and shared that bedroom closet with Leslie. Brittany and Leslie shared the other bedroom,

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[3] The information alleged that Martinez committed the petty theft on or about July 30, 2010. He pleaded no contest on May 13, 2011, and was sentenced on September 2, 2011. As we will explain, section 4019 was amended effective January 25, 2010, and defendant's credits were properly calculated at the one-for-two total rate under the versions of section 4019 in effect when he committed the crime, the date he changed his plea, and the date he was sentenced, given his admitted prior serious felonies as defined in section 1192.7. (Stats. 1982, ch. 1234, § 7 [former § 4019, subd. (f), operative to Jan. 24, 2010]; Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, operative Jan. 25, 2010 to Sept. 27, 2010]; Stats. 2010, c. 426, § 2 [former § 4019, eff. Sept. 28, 2010 to Sept. 30, 2011].)

[4] We take the underlying facts of the crime from the transcript of the preliminary hearing, the probation report, and from papers filed in connection with defendant's *Romero* motion.

where they both kept their things, but Leslie often slept on the couch. The door to Brittany's bedroom was not generally closed and Martinez sometimes used the computer in that room to check his email, with Leslie's permission. Martinez also sometimes used a laundry basket that was kept in Brittany and Leslie's room.

On July 30, 2010, Brittany complained to her mother that some of her clothing (undergarments) was missing from her room. Leslie examined her own things and discovered that certain items of her jewelry were also missing from the same room. Leslie contacted police that day and reported the missing items. She also tried to contact defendant to ascertain if some of his items were missing as well, to no avail. After Leslie had contacted police, she later discovered that some of her undergarments that she kept in the closet of defendant's bedroom were also missing.

A week or two after her initial discovery of the missing items, Leslie still had not been able was to reach Martinez and she became afraid of him. She no longer wanted him living in the apartment. She began communicating to him through a mutual friend to make arrangements to have his possessions removed from the premises. She began packing up his things and during the course of that, found an open backpack in his room among laundry and dirty clothes. The backpack contained some of the items missing from her closet, which shocked and disgusted her. After seeing some of her clothing in the top of the backpack, she did not go through it to see what else was in there. The mutual friend came by with a truck to retrieve defendant's possessions, and Leslie included the backpack among them with her items still inside. Leslie later contacted police again to report that defendant had stolen the missing items and that she had found some of them in his backpack.

Police later followed up and learned that Martinez had a history of theft and burglary. An officer then conducted a parole search of the small storage-shack unit behind another house that Martinez had moved into. Inside, the officer found items of jewelry and women's clothing in various places, along with hypodermic needles and

methamphetamine. The officer collected the jewelry and clothing and contacted Leslie and Brittany to identify their things. At the police station, Leslie identified items of her jewelry that she had last seen in Brittany's bedroom and she viewed photographs of other items of clothing that she identified as belonging to her daughter. The officer contacted defendant in jail, where he had been taken as a result of another incident for which he was arrested, to discuss the items that had been taken from Leslie Isgrig and Brittany. Martinez initially told the officer that he had these items in his possession because they were inside his backpack that Leslie had given to their mutual friend. But then he admitted that he had taken the various items over time from Brittany's room, from the laundry basket located there, or from Leslie's part of their shared closet inside his room, and that he had done so for his own personal use.

Leslie Isgrig later told the probation officer that the property that was stolen belonged to her and her daughter but that she was unable to provide written documentation as to the value of her stolen items. She requested a total of $402.50 in restitution, consisting of $164.50 for her jewelry and $238 for her daughter's clothing, as "delineated in [Brittany's] written statement." This written statement, attached to the probation report, is in Brittany's handwriting and it itemizes her various pieces of stolen clothing and jewelry, with a total claimed loss of $238.

II. *Procedural Background*

After being bound over for trial, Martinez was charged by information with first degree burglary in violation of section 459-460, subdivision (a) (count one); receiving, concealing, or withholding stolen property in violation of section 496, subdivision (a) (count two); and petty theft with a prior in violation of section 666, subdivision (b)(1) (count three). The information included allegations that he had two prior serious felony convictions within the meaning of section 667.5, subd. (a), both first degree burglary in violation of sections 459-460, subdivision (a); two prior strike convictions within the

meaning of sections 667, subdivisions (b)-(i) and 1170.12; and a prison prior within the meaning of section 667.5, subdivision (b).

In a negotiated plea bargain, on May 11, 2011, Martinez pleaded no contest to the petty theft charge alleged in count three and admitted the strike priors and the prison prior, with counts one and two to be dismissed at sentencing along with the two prior serious felony conviction allegations.

On September 2, 2011, the court granted, in part, defendant's *Romero* motion, striking the earlier of his two prior strikes, and sentenced him to six years in prison, consistently with the plea bargain. This sentence consisted of the upper term of three years on count three, doubled for the remaining prior strike. The court dismissed counts one and two, along with their related prior-serious-felony-conviction allegations, under section 1385 and stayed the penalty for the admitted prison prior. The court awarded 489 days of pre-sentence credits, of which 326 were actual days and the remaining 162 were conduct credits under section 4019. The court further awarded victim restitution to Leslie Isgrig, alone, in the total requested amount of $402.50, as recommended in the probation report.

Martinez timely appealed from the judgment of conviction, challenging the sentence or matters occurring after the plea but not affecting its validity. (Cal. Rules of Court, rule 8.304(b).)

DISCUSSION

I. *Defendant is Not Entitled to Additional Conduct Credits*

Martinez contends that principles of equal protection entitle him to additional conduct credits. His contention is that the statutory changes to section 4019 and section 2933, expressly operative October 1, 2011, apply retroactively, in effect, so as to entitle him to one-for-one conduct credits under the current version of section 4019 rather than the one-for-two he was awarded.

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner's good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants who were required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), and those, like Martinez, with a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) For these persons, conduct credit under section 4019 accrued at the same rate as before despite the January 25, 2010 amendments. (former § 4019, subds. (b)(2) & (c)(2).) These amendments to section 4019 effective January 25, 2010 did not state whether they were to have retroactive application.

California courts subsequently divided on the retroactive application of the amendments to section 4019, effective January 2010, and the issue currently remains pending with the California Supreme Court for resolution. (See, *People v. Brown* (2010) 182 Cal.App.4th 1354, rev. granted June 9, 2010, S181963, and related cases.)[5]

[5] Our own view is that the January 2010 amendments to section 4019 were not retroactive, even in the face of an equal protection challenge analytically akin to that

Then, effective September 28, 2010, section 4019 was amended again to restore the less generous pre-sentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits. (Stats. 2010, ch. 426, § 2.) The express provisions treating differently those defendants who are subject to sex-offender registration requirements, those committed for a serious felony or those, like Tooker, with a prior conviction for a violent or serious felony were also eliminated. (*Ibid.*)

At the same time, and by the same legislative action, section 2933, previously applicable only to worktime credits earned while in state prison, was amended to encompass pre-sentence conduct credits for those defendants ultimately sentenced to state prison (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e).) In other words, as of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of pre-sentence conduct credits for those defendants sentenced to a prison term, with certain exceptions. This amendment to section 2933 provided for one-for-one pre-sentence conduct credits, more generous than those simultaneously provided under section 4019, but excluded those inmates required to register as sex offenders, those committed for a serious felony, or those, like Martinez, with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of pre-sentence conduct credits under section 4019, accruing at the less generous one-for-two rate. (*Ibid.*) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

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mounted here. (See, *People v. Hopkins* (2010) 184 Cal.App.4th 615, 627-628, review granted June 21, 2010, S183724 [briefing deferred pending decision in *People v. Brown*, *supra*].)

This brings us to legislative changes made to sections 4019 and 2933 in 2011, as relevant to Martinez's equal protection challenge. These statutory changes, among other things, effectively made section 4019 again applicable to all prisoners for purposes of the calculation of pre-sentence conduct credits, eliminating this element of section 2933 that was in place from September 28, 2010 to September 27, 2011 only, and reinstituted one-for-one pre-sentence conduct credits for all prisoners. (§§ 2933 & 4019, subds. (b)(c) & (f).) These changes to section 4019 were made expressly applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.[6] (§ 4019, subds. (b), (c), & (h).)

As noted, Martinez committed the crime on or about July 30, 2010, and was sentenced on September 2, 2011. Under the law in effect on both dates, he was properly awarded conduct credits on a one-for-two basis (326 days actual credit and 162 days conduct credit).[7]

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have prospective application only, Martinez contends, on equal protection grounds, that he is entitled to the reinstituted one-for-one conduct credits implemented by those changes (326 actual days and 326 days of conduct credit). He argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) compels this result, contending that it held that a new statute that provides for pre-sentence credits

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[6] These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

[7] This is because as to the dates of the July 30, 2010 crime and September 2, 2011 sentencing, and as alleged in the information and admitted by Martinez, he fit into that category of persons with a prior violent or serious felony conviction, who were treated less generously under section 4019 as to an award of pre-sentence conduct credits. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, operative Jan. 25, 2010 to Sept. 27, 2010; Stats. 2010, ch. 426, §§ 1 & 2 [former §§ 2933 & 4019, eff. Sept. 28, 2010 to Sept. 30, 2011].)

for prison inmates was fully retroactive to all prisoners by virtue of the equal protection clause. He also cites *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*), and urges that it implicitly held that felons were similarly situated to all other jail inmates and that the then version of section 4019 was violative of equal protection because it denied conduct credit to felons who were sentenced to prison while making such credits available to other jail inmates.

Preliminarily, to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. In considering whether state legislation is violative of equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) Where, as here, the statutory distinction at issue neither "touch[es] upon fundamental interests" nor is based on gender, there is no equal protection violation "if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities]; *People v. Richter* (2005) 128 Cal.App.4th 575, 584 [legislation creating sentencing disparity or altering treatment of custody credits does not affect fundamental right and is therefore subjected to rational basis review on equal protection challenge].) Under the rational relationship test, " ' " 'a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are "plausible reasons" for [the classification], "our inquiry is at an end." ' " ' " (*Hofsheier*, *supra*, at pp. 1200-1201, italics omitted.)

In *Kapperman*, the Supreme Court reviewed a provision (then-new § 2900.5) that made actual custody credits prospective, applying only to persons delivered to the

Department of Corrections after the effective date of the legislation. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) But *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. A further significant distinction may be drawn between *Kapperman* and this case, in that the liberalization of credit at issue in *Kapperman* applied to prisoners regardless of the offense for which they were imprisoned, whereas the change here affects three well defined sub-classes of offenders: those required to register as sex offenders; those committed for a serious felony as defined in section 1192.7; or those with a prior serious felony, as defined in section 1192.7, or a prior violent felony, as defined in section 667.5.

We likewise reject defendant's reliance on *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604, as cited in a footnote in *Kapperman.* (11 Cal.3d at p. 547, fn. 6.) This Illinois case, like *Kapperman*, was dealing with actual custody, and not conduct, pre-sentence credits, which we are concerned with here. Moreover, the date that was considered potentially arbitrary or fortuitous in the equal protection analysis in *People ex rel. Carroll v. Frye* was the date of conviction, a date out of defendant's control, and not the date the crime was committed. (*People ex rel. Carroll v. Frye, supra*, 35 Ill.2d at pp 609-610.)

Sage is likewise inapposite, because it involved a prior version of section 4019 that allowed pre-sentence conduct credits to misdemeanants, but not felons. (*Sage, supra*, 26 Cal.3d at p. 508.) The high court found that there was neither a "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Ibid.*) But here, the purported equal protection violation is temporal,

rather than based on defendant's status as a misdemeanant or felon. (*People v. Floyd* (2003) 31 Cal.4th 179, 189-191 [" 'punishment lessening statutes given prospective application' " on a certain date " 'do not violate equal protection' "].) Moreover, *Sage* is not dispositive because it did not address an issue of retroactivity, as defendant urges here.

One of section 4019's principal purposes is to motivate or reward good behavior while defendants are in pre-sentence custody. (See, *People v. Brown* (2004) 33 Cal.4th 382, 405 [primary focus of section 4019 is on encouraging minimal cooperation and good behavior by persons detained in local custody].) And it is impossible to influence behavior *after* it has occurred. The fact that a defendant's conduct cannot be retroactively influenced provides a rational basis for the Legislature's express intent that the October 2011 amendments to section 4019 apply prospectively only. (*In re Stinette* (1979) 94 Cal.App.3d 800, 806 [prospective only application of provisions of Determinate Sentencing Act (§ 1170 et seq.) upheld over equal protection challenge]; *In re Strick* (1983) 148 Cal.App.3d 906, 912-913 [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].) This is so even if an inmate has already earned the maximum amount of good conduct credits available under the applicable former version of the statute and is only claiming entitlement to *additional* conduct credits for the same good behavior that earned him those conduct credits in the first place. What illustrates this point is that unquantifiable and unidentifiable group of inmates who did not earn good conduct credits in the same period of time as defendant, but who might have behaved better given enhanced incentives.

We acknowledge that the specific purpose of the amendments to section 4019 that became operative October 1, 2011, was to address the "state's fiscal emergency by effectuating an earlier release of a defined class of prisoners, thereby relieving the state of the cost of their continued incarceration and alleviating overcrowding in county jail

facilities. [Citations.]" (*People v. Borg* (2012) 204 Cal.App.4th 1528, *29][amendments do treat similarly situated classes of persons disparately but the legislation nevertheless bears a rational relationship to a legitimate state purpose].) But we agree with our colleagues in Division One of the First Appellate District that "[r]educing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state's fiscal concerns and its public safety interests." (*Id.* at p. *30.)

We accordingly reject Martinez's contention that he is entitled to additional conduct credits based on amendments to section 4019, operative October 1, 2011.

II. *The Victim Restitution Order Includes Amounts That Exceed the Losses Resulting From the Crime of Which Martinez Was Actually Convicted*

The information alleged at count three—the petty theft with a prior of which defendant was convicted—that on or about July 30, 2010, he did "unlawfully steal, take, and carry away personal property, Clothing and Jewelry, the property of Leslie Isgrig." Similarly, at defendant's change of plea hearing, he pleaded no contest to the charge, as described by the court, of having "take[n] personal property, to wit, clothing and jewelry from a Leslie Isgrig." Thus, neither the charge nor the plea specified that the crime of which defendant was convicted involved the taking of personal property from Leslie Isgrig's 18-year old daughter, Brittany. Yet, the victim restitution order directing payment of $402.50 clearly includes $238 in losses that were claimed to be separately suffered by Brittany and not Leslie Isgrig.

Martinez challenges the victim-restitution order to the extent of $238, contending that because he was not actually convicted of stealing Brittany's property, the order was error. Respondent, on the other hand, contends that defendant has forfeited this claim for his failure to have raised it below, and on the merits, that the order was authorized under section 1202.4, subdivision (f) because it represented a loss claimed by the victim.

Addressing respondent's forfeiture argument first, we observe that Martinez's challenge to the restitution order is purely legal and not dependent on factual matters or determinations. In essence, he contends "that in this nonprobation context, the court imposed the order in excess of its statutory authority." (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179 (*Percelle*).) We concluded in *Percelle* that such a claim presenting a purely legal issue—there, that a defendant could not be ordered to pay victim restitution with respect to losses relating to a criminal charge of which he was acquitted—was not subject to the waiver rule. (*Ibid.*) In so concluding, we noted that an "objection may be raised for the first time on appeal where it concerns an 'unauthorized' sentence, i.e., one that 'could not lawfully be imposed under any circumstances in the particular case.' ([*People v. Scott* (1994) 9 Cal.4th 331, 354].)" (*Percelle, supra*, at p. 179.) We likewise conclude here that defendant's purely legal challenge to the restitution order in this non-probation case is not subject to the waiver rule, and we proceed to the merits.

A trial court's restitution order is generally reviewed for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) A restitution order that demonstrably rests on an error of law constitutes an abuse of discretion. (*People v. Jennings* (2005) 128 Cal.App.4th 42, 49.)

Restitution is constitutionally and statutorily mandated in California. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498; Cal. Const., art. I, § 28(b)(13).) "In pertinent part, the California Constitution, article I, section 28, subdivision (b) provides: 'It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons *convicted of the crimes* for losses they suffer.' (Italics added.) Section 1202.4, subdivision (a) reflects that intention by providing that a 'victim of a crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant *convicted of that crime*.' (Italics added.) The court must

enter a victim restitution order in every case 'in which a victim has suffered economic loss *as a result of the defendant's conduct*.' (§ 1202.4, subd. (f), italics added.)" (*Percelle, supra,* 126 Cal.App.4th at p. 178.) Accordingly, section 1202.4 limits "restitution awards [in the non-probation context] to those losses arising out of the criminal activity that formed the basis of the conviction" because "the term 'criminal conduct' as used in subdivision (f) means the criminal conduct for which the defendant has been convicted.' (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1247 [(*Lai*]).)" (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049 (*Woods*).)

As noted, in *Percelle*, we held that "in the nonprobation context, a restitution order is not authorized where the defendant's only relationship to the victim's loss is by way of a crime of which the defendant was acquitted." (*Percelle, supra,* 126 Cal.App.4th at p. 180.) In that case, the defendant was convicted of several counts relating to his fraudulent use of a stolen access card and theft of a vehicle but he was acquitted of another vehicle-theft charge, to which the improper restitution order related. (*Id*. at p. 168.) We distinguished restitution orders in the probation context in which a defendant may be ordered to pay restitution for crimes of which he or she was not convicted as a condition of probation. (*People v. Lent* (1975) 15 Cal.3d 481, 487; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) This stems from "the notion 'that the granting of probation is not a right but a privilege, and that if the defendant feels that the terms of probation are harsher than the sentence for the substantive offense he is free to refuse probation. [Citation.]" (*Percelle, supra,* 126 Cal.App.4th at p. 180.) The considerations are different when a defendant is sentenced to state prison. In that circumstance, the *Lent* criteria applicable to the probation context do not apply and we look strictly to the governing statute, section 1202.4.

In *Lai*, the defendant had been charged with numerous counts of welfare fraud. The trial court sentenced defendant to state prison and ordered restitution not only for the loss incurred by acts committed within the charged period (1985 to 2000) but also for

amounts obtained outside the charged period (1980 to 1983). In that case, particular economic amounts were attributable to particular calendar periods, which were charged as criminal acts. The court of appeal concluded that it was error to include amounts within the restitution award that could not be attributed to the charged crimes, holding that "when a defendant is sentenced to state prison, section 1202.4 limits restitution to losses caused by the criminal conduct for which the defendant was convicted." (*Lai, supra,* 138 Cal.App.4th at pp. 1246-1249.)

In *Woods*, the defendant was convicted as an accessory to murder; he had been handed the murder weapon by the shooter as the shooter ran away from the scene. The court of appeal likewise distinguished the probation context and held that the defendant's criminal conduct, which all took place after the murder had occurred, had no causal connection to the victim's economic loss or to the criminal conduct of which the defendant had been convicted, so that it was improper to order him to pay restitution for losses stemming from the murder. (*Woods, supra*, 161 Cal.App.4th at pp. 1049-1052.)

Here, similarly, Britanny's losses were beyond the criminal conduct of which Martinez was convicted. Respondent attempts to elude this fact by urging that Brittany, who was 18 years old, lived with her mother and was dependent on her, thus equating her losses with those of her mother, for which defendant must properly pay restitution. But the record does not establish Brittany's asserted dependency. Moreover, she was indisputedly an adult whose losses were discrete and separately identifiable from those of her mother, Leslie Isgrig. The People could have charged Martinez with petty theft of Brittany's separate property but this was not done, and he did not enter a no-contest plea with respect to this uncharged conduct. Accordingly, the restitution order here directs payment of $238 to a victim for criminal conduct that is outside of the criminal acts of which defendant, who was sentenced to state prison, was convicted. (*Lai, supra*, 138 Cal.App.4th at p. 1249.) To this extent, the order exceeded the limits of

section 1202.4, constituting an abuse of the trial court's discretion. Our disposition will accordingly modify the order by deducting $238 from the $402.50 ordered to be paid.

DISPOSITION

The victim restitution order under section 1202.4 is reduced from $402.50 to $164.50. The clerk of the superior court is directed to amend the abstract of judgment in accordance with this disposition and transmit the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

Duffy, J.*

WE CONCUR:

Rushing, P.J.

Premo, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.